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No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners,

vs.

LEE A. FREEMAN and RICHARD F. LEVY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN O'C. FITZGERALD, pro se
10 South LaSalle Street
Chicago, Illinois 60602
CEntral 6-2222

CHARLES F. MARINO, pro se
120 South LaSalle Street
Chicago, Illinois 60603
CEntral 6-4260

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Petitioners, John O'C. FitzGerald and Charles F. Marino, pursuant to Rule 58(2) of the Rules of this Court, respectfully petition this Court for a rehearing of its order, entered on October 20, 1969, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The grounds are as follows:

1. The American Bar Association Special Committee on Evaluation of Ethical Standards has prepared its final draft of the proposed Code of Professional Responsibility. This final draft is dated July 1, 1969, and has now been published in booklet form. It covers contingent fees for legal services and division of fees among lawyers, which are presently dealt with in Canons 13 and 34 of the existing Canons of Ethics on which hinged the decisions of the district court and Court of Appeals in this case.

2. Proposed Canon 2 of the Committee's final draft, provides:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

3. The ethical considerations proposed by the Committee with respect to Canon 2, insofar as they pertain to contingent fees for legal services and division of fees among lawyers, are as follows:

> "EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid . . ."

> "EC 2-22 Without consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may be properly divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable."

4. The disciplinary rules proposed by the Committee with respect to Canon 2, insofar as they are here pertinent, are as follows:

"DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

* * *

(8) Whether the fee is fixed or contingent.

* * *

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

5. However, the proposed Canons, as well as the ethical considerations and disciplinary rules fail to resolve the matter involved in this case, namely what powers do trial courts possess to upset contingent fee contracts and award lawyers fees based on quantum meruit where the client does

not complain and there is no evidence of fraud, undue influence, mistake, oppression, extortion or that the fee specified in the contingent fee contract is unreasonable.

6. The rulings of the Court of Appeals and district court in this case conflict with cases, such as *Corsiglia* v. *Hammersmith,* 81 Nev. 387, 404 P.2d 8 (1965), where the Court held that an attorneys' agreement for equal sharing of fees, including extraordinary fees, for services performed during probate regardless of division of work was enforceable absent recognized legal defenses. Here, the Agreement of December 20, 1960 was entered into to compensate Petitioners for work done from the outset of the case to the date of the agreement when the Respondents, Freeman and Levy, entered the case. Freeman and Levy approved the agreement and there could be no question about future division of work between the Petitioners and Respondents because Petitioners had no obligation to perform any further services. (App. 15).

The question here is: Where is the legal profession going with contingent fee contracts, particularly where more than one lawyer and a division of fees is involved? The existing Canons of Ethics provide no satisfactory answer, nor do the proposed Canons. The Court decisions are conflicting. Yet this case provides the vehicle by which this Court can settle the matter and offer the guidelines, which should be adopted by the American Bar Association in the new Code of Professional Responsibility.

7. This Court's decisions have dealt with Canons of Ethics previously in cases such as *NAACP* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963), *Brotherhood*

of R.R. Trainmen v. *Virginia,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), and *United Mine Workers* v. *Ill. State Bar Ass'n,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967).

Respectfully submitted,

JOHN O'C. FITZGERALD, *pro se*
10 South LaSalle Street
Chicago, Illinois 60602
CEntral 6-2222

CHARLES F. MARINO, *pro se*
120 South LaSalle Street
Chicago, Illinois 60603
CEntral 6-4260

CERTIFICATE

Petitioners, John O'C. FitzGerald and Charles F. Marino, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay and further is restricted to grounds as specified in Rule 58(2) of the Rules of this Court.

JOHN O'C. FITZGERALD, *pro se*
CHARLES F. MARINO, *pro se*